IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.187 OF 2007

Oil & Natural Gas Corporation Ltd. .. Petitioner.

Versus

Jindal Drilling & Industries Ltd. .. Respondent.

WITH

ARBITRATION PETITION NO.210 OF 2007

Jindal Drilling & Industries Ltd. .. Petitioner.

Versus

Oil & Natural Gas Corporation Ltd. .. Respondent.

Mr.Rajeev Kumar i/b.Bhat & Saldanha for petitioner.

Mr.P.Sancheti i/b.Ruben Fernandes for respondent.

CORAM : S.C.DHARMADHIKARI, J.

DATE : 14th September, 2007.

P.C.:

1. These petitions are under the Arbitration Act, 1940, for short, old Act. The Reference is of 1994. However, the Award is dated 19th April, 2006. The

Reference took about 12 years for its disposal principally because the Arbitrators either expired or stepped down. The reasons for delay are set out in paragraph 1 of the Award. The Award is challenged by both the original claimants and respondents. The claimant is aggrieved by rejection of Claim No.1, whereas the original respondent (ONGC) is aggrieved by Award of Claim No.2 by the Tribunal.

2. Heard Mr.Rajeev Kumar appearing for the petitioner and Mr.Sancheti appearing for the respondent.

3. The petitioner Oil & Natural Gas Corporation Ltd. (for short "ONGC) challenges the Award dated 19th April, 2006, copy of which is annexed at Exhibit-A to the petition, to the extent it directs them to pay to the respondents under Claim No.2, a sum of Rs.52,21,962.78 and interest thereon.

4. The undisputed facts are that the claimants before the Arbitral Tribunal are the respondents, who were awarded contract by the petitioner ONGC in response to their bid being accepted. The respondents in pursuance of the contract placed their confirmed order for the charter hire of Jack-up rigs for drilling exploratory /

development wells in Indian Offshore waters. They had to make arrangements to hire the rig in advance so as to mobilise the same for the contract, if awarded. For the purposes of deployment of the Rig, various expenses were incurred by the respondents. However, there is no question of any payment under the Contract for mobilization, but, upon mobilization, it would be made in foreign exchange at a certain rate and the difference between the actual rate incurred by the claimants and the charter-party rate would also be compensated.

5. The claimants in terms of the contract and more particularly, as per clause, pertaining to foreign exchange escalations submitted their claim but the ONGC refused to take into consideration the exchange escalation. It was stated that the escalation would be payable only on the operating costs. There was correspondence between parties but the ONGC refused to take into consideration the exchange escalation and that is how the first claim for foreign exchange escalation on mobilisation charges, payments for certain stores and spares, equipment rental, rig hire charges etc. arose for consideration.

6. Upon material being produced and the submissions

canvassed, the Arbitral Tribunal rejected the first claim and that is how the original claimant-petitioner is challenging that part of the Award in Arbitration Petition No.210 of 2007.

7. Rejection of Claim No.1 by the learned Arbitrator has led to filing of Arbitration Petition No.210 of 2007 by the original claimant. The Award insofar as Claim No.2 is concerned, is impugned by ONGC as indicated above. The petition of ONGC being Arbitration Petition No.187 of 2007 and that of the Respondents-claimants were heard together and are being disposed of by this common order.

8. Mr.Sancheti in support of Arbitration Petition No.210 of 2007 contends that the Arbitral Tribunal was in clear error in rejecting the Claim No.1. He submits that the Award is vitiated by error apparent inasmuch as the bids were invited by ONGC and thereupon the Letter of Intent was issued on 22nd March, 1988. The request was to mobilise the contract and that is how the Rig was requisitioned and procured. The contract period was of two years. However, for actual working and execution of the project work, arrangements were made to meet all requirements in advance as has been pointed out before the Arbitral Tribunal. The claimants procured all equipments

and that is how the Rig came at site. Merely because the operations commenced from 21st April, 1989 does not mean that procuring expenses and charges cannot be awarded. He submits that the award clearly overlooks contract between parties so also vital material inasmuch as the Letter of Intent and more particularly Clauses (CCC), (DDD) and (EEE) of Contract are totally overlooked. In his submission, the claim gets support from a letter dated 21st October, 1988, addressed by ONGC to the Joint Controller, Reserve Bank of India. In it, ONGC had made a strong plea to Reserve Bank of India in the form of a request that the claimants application be considered with regard to Remittance of US$ 1.5 million for payment to their transport contractors for the mobilisation of their Rig from its present location to Indian waters. Mr.Sancheti also relies upon a document which was placed before the Tribunal and that is a letter dated 21st June, 1988, addressed to the Additional Director of the ONGC, pointing out that the Rig was finalized and mobilized. In such circumstances, when all arrangements, prior to the actual operations are also covered under the obligations, then, the subject claim could not have been rejected by relying upon clause No.7.5. In other words, the restrictive interpretation on the said clause does not do justice to the claim when both sides have envisaged the

payment also for pre-operational expenses. The Award is therefore, clearly vitiated and must be interfered with.

9. Mr.Kumar submits that the Award insofar as rejection of first claim is concerned, is fully justified and does not require any interference because the Arbitrators have placed their interpretation on the subject clause. He submits that the claimants had conceded before the Arbitral Tribunal that they are not entitled to mobilisation charges. However, only dispute is that the foreign exchange part of the mobilization should be covered by the foreign exchange escalation clause. He, therefore, submits that the clause has been interpreted to mean that whatever is payable must be reckoned from the date of actual operations and that is consistent with the intent of parties. Unless, the interpretation placed by the Tribunal is wholly perverse, then, it is not for this Court to interfere merely because in its opinion, another view of the matter is possible. In such circumstances, the claim has been rightly disallowed.

10. With the able assistance of the learned Counsel appearing for both sides, I have perused the Award. In paragraph 24 of the Award, Clause 7.5 has been referred to

and the Arbitral Tribunal held that for the costs adjustable and where foreign exchange escalation is payable, are only in Indian Rupee, equivalent of what is payable under the Agreement which has already been paid. Therefore, the amounts which are claimed in this case do not fall in that category. Clause 7.5 could not have been pressed into service and more particularly, sub clause (c) thereof, because in the opinion and view of the Arbitral Tribunal that does not permit foreign exchange escalation for any expenditure incurred by the claimants in the execution of the Contract, irrespective of whether the expenditure was incurred during the currency of the arrangement or otherwise. I have also perused the subject clause which reads thus :-

> "7.5 The contractor shall give break-up including operating costs and schedule of foreign exchange requirements indicating the currency required on quarterly basis. The reasonableness of the schedule will be examined by the Operator. On the basis of agreed schedule, the operator shall make the rupees payment for the foreign exchange requirement of the quarter on the basis of the BEC selling rate of SBI prevailing on the first day of the quarter."

11. The clause states that the contractor shall give break-up, including operating costs and schedule of foreign exchange requirement indicating the currency required. The petitioners were to examine the reasonableness of the quarterly schedule submitted by the respondents. It was only on the basis of an agreed schedule that payment would be made by the respondents. On the basis of the Rig mentioned in the clause, how the rate has to be computed is also set out therein. Thus, reading the clause as a whole, the view taken by the Arbitral Tribunal does not appear to be such as could be termed as perverse. All documents which have been placed before the Tribunal, including the one to which my attention is invited by Mr.Sancheti are referred by the Tribunal and it has clearly held that before the contract was executed the work of mobilisation was started. The claimants raised invoices and the payments were refused on the ground that foreign exchange fluctuations were to be picked up only with operating cost which would start when the Rig would commence its operation. The interpretation, thus, placed is consistent with the conduct of parties and wording of the terms of the contract. In such circumstances, I am unable to accept the contentions of Mr.Sancheti that the Award is vitiated on this count and

liable to be interfered with. In these circumstances, Arbitration Petition No.210 of 2007 fails and is accordingly dismissed.

12. Insofar as Arbitration Petition No.187 of 2007 is concerned, that impugns the second claim which is awarded. The second claim arose from the fact that the contract commenced from 21st April, 1989 and expired on 21st April, 1991. As per the contract, and more particularly, clause 1.3(b) of the same, it got automatically extended till the work on the location is completed.

13. It appears that the contract ultimately expired on 4th October, 1991. The ONGC approached the Government for release of foreign exchange for the extended period on 5th June, 1991. However, the release was obtained only on 4th December, 1991. The Reserve Bank of India’s communication in that behalf is dated 6th December, 1991. Thus, according to the claimants during the entire extended period, they operated without foreign exchange release being obtained by ONGC. They had to therefore incur all expenses and make payments in foreign exchange themselves till 6th December, 1991. The claim projects the exchange rate per US$ prevalent in July, August 1991. The rate prevalent in October, December, 1991 was different. The

Arbitral Tribunal awarded Claim No.2 for the sum of Rs.52,21,962.78 as additional expenditure on account of foreign exchange fluctuation together with interest thereon.

14. This claim having been awarded in favour of the respondents-claimants and against the ONGC, this petition has been presented under Section 30 of the Arbitration and Conciliation Act, 1940. Mr.Kumar's submission is that there is no question of delay by ONGC insofar as the claimants application for release of foreign exchange. The ONGC can only facilitate in approaching the competent authority, namely, the Reserve Bank of India. It is not as if the ONGC did not make any application. The admitted facts are that pursuant to an application, the Release order came in December, 1991. Thus, there is no question of the ONGC being called upon to pay the claim to the claimants. He, therefore, submits that the Arbitral Tribunal could not have awarded the second claim in favour of the claimants. Reasoning in that behalf is wholly perverse and contrary to the stipulations in the Contract. The Award goes much beyond the reference and is, therefore, liable to be interfered with in the limited jurisdiction of this Court under Section 30 of the old Act. He submits that the Tribunal has not at all applied

its mind to the basic and fundamental aspects of this second claim. Hence, it is liable to be interfered with.

15. Mr.Sancheti, on the other hand, submits that the said claim has been awarded by the Tribunal on the basis that the obligation of the ONGC was to provide foreign exchange during the contract period. The claim arose on the basis that the ONGC failed to procure it. In such circumstances, the Arbitral Tribunal was in no error, enforcing this obligation under the Contract and calling upon the ONGC to pay the sums, more so, when in the reply / written statement filed before the Tribunal, there is no serious dispute raised. He submits that when the Arbitral Tribunal had rejected all claims for foreign exchange escalation insofar as the pre-operational period is concerned, the Tribunal logically considered the interpretation placed on these terms in the Contract. The second claim which expressly arose out of the operations during the contract period / extended period are awarded in favour of the claimants. He has invited my attention to the reasoning in paragraph 28 of the award and has submitted that in the limited jurisdiction conferred upon this Court it is not permissible for it to re-appraise and re-appreciate the material. In such circumstances, the Award is not liable to be interfered with.

16. Mr.Kumar has placed reliance upon a Supreme Court decision reported in **(2003) 5 S.C.C. 705 (Oil & Natural Gas Corporation Ltd. v/s.Saw Pipes Ltd.)** and the terms and conditions of the Contract, whereas Mr.Sancheti relies upon a Constitution Bench decision reported in **AIR 1992 SC 782 (Secretary, Irrigation Department, Government of Orissa and Ors. v/s.G.C.Roy).** That decision has been relied upon by Mr.Sancheti to meet the several submissions of Mr.Kumar. He submits that there is no question of ONGC upholding any amounts which were allegedly due and payable. The question is of obtaining a permission and having the amounts released in favour of the claimant. Such an arrangement does not come within the purview of withholding any sums under the Contract. The question of depriving the contractor of any legitimate sums or dues does not arose at all. In such circumstances and in the teeth of the clause, no interest could have been awarded.

17. Having perused the award insofar as the second claim as well, in my view, there is much substance in the contention of Mr.Sancheti, appearing for the contractor-claimants. This is not a case where Arbitral Tribunal has mis-conducted himself while awarding the claim. Upon the plain reading of the terms and conditions

of the Contract so also the documents and pleadings, all that the Tribunal was concerned with was whether the Contractor was entitled to the sum which was to be released to him. In that behalf, the Tribunal observed that the claim (2nd claim) cannot be said to be devoid of substance. Secondly, relying upon the ONGC's pleas in the written statement when the claim itself is not denied so also the prevailing rate, the claim is awarded. All that was contended by ONGC was that on account of time that has lapsed, it was difficult to trace all their files and confirm the correctness of the documents. According to the Arbitral Tribunal, the ONGC could not trace their own documents during the course of the proceedings and that cannot be the ground to disallow the claim No.2 of the Contractor. For the extended period of the Contract, the respondents released foreign exchange at a later date and the claimants had to buy foreign exchange at a rate as shown in the statements of the State Bank of India produced before them, then, all that the Contractor is claiming is the difference between the rate paid by them and the rate quoted in the Agreement. Such difference was liable to be considered with in terms of the Contract itself. It is not in serious dispute that the obligation to provide the foreign exchange is that of ONGC and they failed to do so. In such circumstances and considering

the reasoning of the Arbitral Tribunal in paragraph 28 of the Award, I am of the view that the Award cannot be said to be vitiated on this ground. Therefore, there is no question of the same being interfered with.

18. On the quantum of interest as well, the Arbitral Tribunal was aware of the decision of a Five Judge Bench of the Supreme Court. It perused the Contract stipulations and observed that there is no prohibition insofar as the Award of interest is concerned. These clauses have also been perused by me and Mr.Kumar. They do not point out that anything which would enable the Tribunal to conclude that grant of interest is prohibited. There is no question of Arbitral Tribunal not awarding interest in this case inasmuch as in paragraph 31 of the Award, it has observed thus :-

> "31. The right to withhold, in our opinion, only means an obligation on the claimants to continue to perform their obligations without interruption, notwithstanding the withholding of certain payments due to them, and does not entitle the respondents to contend that, even after the dispute between the parties is resolved in favour of the claimants, they are not liable to pay

interest. In Arbitration, any decision on the rights of the parties will relate back to the date on which the payment was wrongly withheld."

19. This observation of the Arbitral Tribunal must be seen in the backdrop of the peculiar facts of this case and the contract in question. The Arbitral Tribunal interpreted the terms and conditions and considered the Five Judge Bench decision and awarded interest. In this behalf, the decision reported in **AIR 1992 S.C. 732 (supra)** is relevant. In paragraph 45 of its judgement this is what is stated by the Hon'ble Supreme Court :-

"45. Where the agreement between the parties does not prohibit grant of interest and where a party claims interest and that dispute (along with the claim for principal amount or independently) is referred to the arbitrator, he shall have the power to award interest pendente lite. This is for the reason that in such a case it must be presumed that interest was an implied term of the agreement between the parties and therefore when the parties refer all their disputes - or refer the dispute as to interest as such - to the arbitrator, he shall have the power to award

> interest. This does not mean that in every case the arbitrator should necessarily award interest pendente lite. It is a matter within his discretion to be exercised in the light of all the facts and circumstances of the case, keeping the ends of justice in view."

20. There is substance in the contention of Mr.Sancheti that the Award granting interest is not liable to be interfered with. The Tribunal has awarded interest @10% which is also reasonable.

21. For the reasons aforestated, both arbitration petitions must, therefore, fail and are accordingly dismissed.

22. In the light of the dismissal of the petition presented by ONGC and the Award being executable upon dismissal of ONGC’s petition under Section 30 of the 1940 Act, what must logically follow is that the Award should become Rule of the Court. Accordingly, there will be a decree in terms of the Award. No order as to costs.

(S.C.Dharmadhikari, J.)